In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG, PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

On July 23, 1948, petitioner, a Chinese national, filed in the District Court for the District of Columbia a petition for a writ of habeas corpus (R. 2–4), alleging that he had resided in the United States since his arrival on April 21, 1946; that on or about October 14, 1947, he was taken into custody under a warrant of arrest issued by the Attorney General on the preceding day; and that on December 11, 1947, he had been accorded a hearing before a presiding inspector of the Immigration and Naturalization

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Service under the arrest warrant, following which he was ordered deported. The petition challenged the validity of the deportation order (R. 3) on the ground that the hearing accorded him had not been conducted in accordance with the provisions of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, *et seq.* In particular, it was alleged that the presiding inspector was not a qualified hearing examiner appointed pursuant to Section 11 of the Act and "was responsible to and subject to the supervision and direction of" officers and agents of the Immigration and Naturalization Service "engaged in the performance of investigation and prosecuting function[s]," in violation of the separation of functions provisions of Section 5 (c).

The writ issued (R. 4–5) and a return was filed (R. 6). Following a hearing, the District Court (Holtzoff, D. J.) entered an order (R. 7) and opinion (80 F. Supp. 235) discharging the writ and remanding petitioner to custody, on the ground that the deportation hearing "was in accord with the provisions of law that govern same" and that the Administrative Procedure Act has no application to such hearings, by virtue of Section 7 (a) thereof, which provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute" (R. 6–7; 80 F. Supp. 235–

236). The "statute" which, in the opinion of the District Court, "specially provide[s] for" the conduct of deportation hearings is Section 16 of the Immigration Act of 1917 (80 F. Supp. at 236).

On appeal by petitioner to the Court of Appeals for the District of Columbia Circuit, the judgment of the District Court was affirmed (R. 9). The *per curiam* opinion of the Court of Appeals states simply that:

> The judgment of the District Court is affirmed on the opinion of Judge Holtzoff. *Wong Yang Sung* v. *Clark*, 80 F. Supp. 235. It is immaterial that appellant entered the United States legally. *Azzollini* v. *Watkins*, (C. A. 2d) decided March 10, 1949 [172 F. 2d 897].

The decision of the court below, as indicated in the opinion, is in accord with that of the Court of Appeals for the Second Circuit in *Azzollini* v. *Watkins*, 172 F. 2d 897. There are no contrary decisions,[1] and, the Government is of the view that the issues here mooted have been correctly decided below.

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[1] *Eisler* v. *Clark*, 77 F. Supp. 610 (D. C.) held that deportation proceedings are subject to the requirements of the Administrative Procedure Act. But in that case the court evidently overlooked the excepting clause in Section 7 (a) of the Act and the effect of that clause, in view of Section 16 of the Immigration Act of 1917, as exempting deportation proceedings from the provisions of the Administrative Procedure Act. At least, Section 7 (a) is not mentioned in the opinion. In any event, even if the *Eisler* case could be con-

Nevertheless, the questions raised are of obvious importance in the administration of the immigration laws and an early authoritative decision seems desirable from every point of view.

Consequently, the Government does not oppose the issuance of a writ of certiorari in this case.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1949.

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sidered a contrary decision in respect of the point now under discussion, it must be taken to have been overruled by the decision of the Court of Appeals in the present case.

Diametrically opposed to the *Eisler* case is *Fajardo* v. *United States* (S. D. N. Y., Civil 46–214, not reported). See Ginnane, "*Rule Making*," "*Adjudication*" *and Exemptions under the Administrative Procedure Act*, 95 U. of Pa. L. Rev. 621, 635. See also the statement of Mr. Ashley Sellers, Chairman, National Committee, Section on Administrative Law, American Bar Association, that in his opinion the *Eisler* case was erroneously decided (Hearings before Senate Judiciary Subcommittee on Immigration and Naturalization on S. 2755, 80th Cong., 2d sess, p. 102).

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